APPELLANT PRO SE:

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IN THE COURT OF APPEALS OF INDIANA

JAMES SAPP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0603-PC-187
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Judge Pro Tempore
Cause No. 49G01-0205-PC-124625

January 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Sapp appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his 2003 convictions for burglary and theft. We affirm.

Issue

The sole restated issue is whether Sapp received the effective assistance of trial counsel.

Facts

On direct appeal, we related the facts supporting Sapp's convictions as follows:

> On April 6, 2002, Charles Beasley ("Beasley") and Sapp were drinking at a bar on Shelby Street in Indianapolis. After the bar closed, Beasley and Sapp, who Beasley knew as "Ed," drove around in search of more alcohol and drugs. The pair was unsuccessful in procuring additional intoxicants, so Sapp dropped Beasley off at the residence of an acquaintance, and left. Beasley soon left as well, and another acquaintance drove him back to his apartment.
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> Upon arriving, Beasley noticed Sapp's pickup truck backed up to the stairs leading to Beasley's apartment. Beasley approached the pickup, and saw his rented stereo equipment in the bed of the truck. After calling 9-1-1 on his cellular phone, Beasley saw Sapp exit from his apartment, and confronted Sapp about the items in his pickup truck. The two argued, and Sapp began to throw the stereo equipment from the truck. Sapp tried to leave in his truck, but the transmission would not engage. Beasley punctured both rear tires to prevent Sapp from leaving before police arrived. Sapp exited his truck and fled down an alley.
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> Indianapolis Police Department Officer Edward Brickley ("Officer Brickley") arrived after Sapp left, and saw Beasley standing by the pickup. Officer Brickley went upstairs and observed that Beasley's apartment door had been recently kicked in, and the apartment ransacked.

Sapp v. State, No. 49A02-0308-CR-716, slip op. pp. 2-3 (Ind. Ct. App. Apr. 23, 2004).

The State charged Sapp with Class B felony burglary, Class D felony theft, and alleged that he was an habitual offender. Following a bench trial on June 25, 2003, the trial court found Sapp guilty as charged and found that he was an habitual offender. It sentenced Sapp to an aggregate term of sixteen years—the minimum six years for the Class B felony, plus a minimum habitual offender enhancement of ten years, and a one-year term for the Class D felony to be served concurrently. We affirmed Sapp's convictions on appeal.

On January 3, 2005, Sapp filed a pro se PCR petition alleging that he received ineffective assistance of trial counsel. The post-conviction court held a hearing on the petition on October 25, 2005, and denied it on February 6, 2006. Sapp now appeals.

Analysis

When reviewing the judgment of a post-conviction court, we consider only the evidence and reasonable inferences supporting its judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). "The post-conviction court is the sole judge of the evidence and the credibility of the witnesses." Id. at 468-69. "To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court." Id. at 469. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse only upon a showing of clear error, which only occurs if we are left with a definite and firm conviction that a mistake has been made. Id. "Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the

opposite conclusion, will its findings or conclusions be disturbed as being contrary to law." Id.

Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). A reasonable probability arises if confidence in the outcome of the trial is undermined. Id.

"We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions." Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006). Whether a lawyer performed reasonably under the circumstances is determined by examining the whole of the lawyer's work on a case. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. "A defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead, 845 N.E.2d at 1036.

Sapp appears to advance four reasons why he believes trial counsel was ineffective. First, he contends counsel should have objected to the State's request for a continuance on the morning of trial, June 25, 2003. However, Sapp has failed to explain how he was prejudiced by this lack of an objection. Although the trial court originally granted the State's continuance motion, the trial proceeded on June 25, 2003 after Sapp agreed to a bench trial instead of a jury trial.[1] Even if defense counsel had objected to the continuance request and such objection had been sustained, Sapp has failed to demonstrate how the result of his trial would have been any different. Counsel's performance was not ineffective for failing to object to the State's June 25, 2003 continuance motion.

Second, Sapp seems to contend that trial counsel was ineffective for not doing more to secure the attendance of his brother at trial, or to attempt to discern what his brother's testimony might be.[2] We believe that Sapp's argument on this point essentially is an attempt to relitigate an issue we decided against Sapp on direct appeal, namely that the trial court erred in not granting a continuance to Sapp to allow him to procure his brother's attendance at trial. Although we initially concluded that the continuance issue was waived, we went on to state, "Sapp's testimony fails to show that Sapp's brother would have provided any relevant or material evidence for the defense." Sapp, slip op. p. 5. Specifically, the offer of proof regarding the brother's expected testimony, as well as

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[1] Sapp has not argued that waiver of his jury trial right was unknowing or involuntary.

[2] Sapp's argument on this point is not entirely clear.

Sapp's own testimony, revealed that the brother was not a witness to the alleged burglary and theft.

A petitioner for post-conviction relief cannot escape the effect of res judicata merely by using different language to phrase an issue and define an alleged error. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). We already concluded on direct appeal that there was no indication that Sapp's brother could have helped the defense; there was no evidence presented in the PCR hearing that would contradict that conclusion. A defendant claiming ineffectiveness of counsel based on the failure to produce a witness bears the burden of demonstrating that the witness would have been useful to the defense. See Lee v. State, 694 N.E.2d 719, 722 (Ind. 1998), cert. denied, 525 U.S. 1023, 119 S. Ct. 554 (1998). Sapp did not meet that burden regarding his brother.

Next, we address Sapp's claim that trial counsel "sold him down the river" when he advised Sapp not to accept the State's plea offer. Appellant's Br. p. 6. Initially, we note that no written plea offer appears in the record before us. Sapp stated at the PCR hearing that the offer was for a total sentence of six years; trial counsel did not contradict Sapp on that point but it is not clear that counsel remembered the details of the offer. The trial transcript reveals the following statement by the prosecutor before trial began:

> And just for the record, Mr. Sapp still has before him the absolute minimum offer on this case. It's a "B" Felony Burglary and the Habitual Offender, and he can have sixteen (16) years flat. No probation. Nothing. He does his eight years—if he behaves—and he's done.

Trial Tr. p. 4. Although Sapp went to trial, he still received an aggregate sentence of sixteen years, or precisely what the prosecutor was offering before trial began. Even if we were to somehow conclude that trial counsel gave Sapp poor guidance in advising him to reject the State's plea offer, he was not prejudiced in any way. His resulting sentence would have been the same if he accepted the offer.

However, even if Sapp's recollection of the plea offer as providing for a six-year sentence was correct, we cannot say trial counsel's performance was ineffective in advising him to reject the offer. Trial counsel testified at the PCR hearing that at the time he advised Sapp to reject the offer, the State was having difficulty getting key witnesses, apparently including the victim, to appear in court. Thus, counsel felt it was worth the risk to reject the offer at that time and to attempt to force the State to dismiss the case if the witness or witnesses did not appear. This was not an unreasonable piece of advice.

Additionally, there is no indication that Sapp was misadvised as to the penal consequences he was facing if he went to trial or was otherwise misadvised as to the law. Nor is there any claim or evidence that trial counsel failed to tell Sapp of the offer or explain it to him, or that Sapp was not involved in the decision-making process regarding the plea offer, or that counsel somehow prevented Sapp from expressing to the trial court that he wanted to plead guilty rather than go to trial. Cf. Dew v. State, 843 N.E.2d 556, 568 (Ind. Ct. App. 2006), trans. denied (holding defense counsel has a duty to inform client of plea offers from the State and to allow the defendant to be involved in the decision-making process regarding acceptance or rejection of the plea) (quoting Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir. 1986)), cert. denied. Sapp has not established

that trial counsel was ineffective in relation to the State's final plea offer and Sapp's ultimate rejection of it.

Finally, we briefly address Sapp's claim that trial counsel failed to perform any meaningful pre-trial investigation into the case. We apply a great deal of deference to the judgment of counsel when reviewing a claim of ineffective assistance of counsel for failure to investigate or prepare for trial. Parish v. State, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Counsel is effective in this regard if reasonable, thorough investigation is made, or if reasonable professional judgment supports limitations on the extent of investigation. Id. (quoting Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066). A defendant claiming that trial counsel's pre-trial preparation was inadequate must make a showing that the outcome of the case likely would have been different if additional investigation had occurred. See Boesch v. State, 778 N.E.2d 1276, 1284 (Ind. 2002). Sapp's general assertion that trial counsel should have done more investigation regarding things such as fingerprints and crime scene photographs and should have deposed witnesses before trial does not meet this burden. He fails to explain how such investigation likely would have led to his acquittal and, therefore, has not established that trial counsel's preparation was constitutionally ineffective.

Conclusion

Sapp did not meet his burden of establishing that he received ineffective assistance of trial counsel. The post-conviction court properly denied his PCR petition. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.